

Montana Water Court  
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IN THE WATER COURT OF THE STATE OF MONTANA  
CLARK FORK DIVISION  
KOOTENAI RIVER BASIN (76D)  
PRELIMINARY DECREE

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CLAIMANT: Perry McDowell

CASE 76D-0282-R-2023  
76D 26569-00

**NOTICE OF FILING OF MASTER’S REPORT**

This Master’s Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master’s Report within **10 days** of the stamped date if you disagree or find errors with the Master’s findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master’s Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master’s Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master’s Report.

## **MASTER'S REPORT**

### **Statement of the case**

Irrigation claim 76D 26569-00 appeared in the Preliminary Decree for this Basin with the following issue remark:

THE CLAIMED POINT OF DIVERSION IS IN QUESTION. THE LOCATION OF THE HEADGATE CANNOT BE IDENTIFIED FROM AVAILABLE DATA.

Issue remarks result from Department of Natural Resources and Conservation (“DNRC”) claims examination. Claims examination confirms the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. Montana law requires the Water Court to resolve issue remarks. Claimant, Perry McDowell, failed to complete the issue remark resolution process.

### **Issue**

What is the historically accurate point of diversion and is the point of diversion issue remark resolved?

### **Findings of fact**

1. On August 2, 2023, DNRC filed a Memorandum concerning claimant’s lack of participation and completion of the issue remark resolution process. DNRC explained that the point of diversion issue remark did not overcome the prima facie statement of claim.
2. The Preliminary Decree abstract identifies the historically accurate point of diversion.

### **Principles of law**

1. A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content. Section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that an element of the prima facie claim is incorrect. This is the burden of

proof for every assertion that a claim is incorrect. Rule 19, W.R.Adj.R. A preponderance of the evidence is a “modest standard” and is evidence that demonstrates the fact to be proved is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 348, 240 P.3d 628.

2. The Montana Water Court is permitted to use information submitted by the Department of Natural Resources and Conservation, the statement of claim, information from approved compacts, and any other data obtained by the Court to evaluate water right claims. Section 85-2-231(2), MCA.

3. When resolving issue remarks, the Montana Water Court must weigh the information resulting in the issue remark and the issue remark against the claimed water right. Section 85-2-247(2), MCA.

4. If the Montana Water Court cannot resolve issue remarks based upon information in the claim file or information available to the Court, claimants shall be required to confer with the DNRC to attempt resolution of the issue remarks. Claimants shall file documentation to resolve the issue remarks, and the DNRC shall submit recommendations regarding disposition of the issue remarks. Section 85-2-248(5), MCA.

5. The Montana Water Court has the authority to resolve issue remarks when the claim file and information available to the Court provide a sufficient basis to do so. Section 85-2-248(3), MCA.

## **Analysis**

### **Historical point of diversion and point of diversion issue remark resolution**

Claimant was ordered to meet with the DNRC to attempt resolution of the point of diversion issue remark appearing on irrigation claim 76D 26569-00. DNRC reported it reviewed the claim file, a 1979 aerial photo, the Flathead and Lincoln County Water Resources Surveys, and Montana Lidar information between 1990 and 2003. DNRC concluded that there was “no reason to believe that the headgate doesn’t exist.”

The DNRC Memorandum and its attachments may be viewed on the court’s case management system, FullCourt Enterprise, at document sequence 2.00.

## **Conclusions of law**

Based upon the DNRC's report, the point of diversion issue remark does not overcome prima facie statement of claim 76D 26569-00. The issue remark should be removed from the abstract.

## **Recommendations**

Irrigation claim 76D 26569-00 accurately reflects historical use. No changes to the elements of the claim should be made.

The point of diversion issue remark should be removed from the claim abstract.

A Post Decree Abstract of Water Right Claim accompanies this Report to confirm removal of the issue remark in the state's centralized water right record system.

**ELECTRONICALLY SIGNED AND DATED BELOW.**

## **Service via USPS Mail**

Perry McDowell  
7 Woodside Pl  
Carmel Valley, CA 93924-9545

**POST DECREE  
ABSTRACT OF WATER RIGHT CLAIM  
KOOTENAI RIVER  
BASIN 76D**

**Water Right Number:** 76D 26569-00 STATEMENT OF CLAIM  
**Version:** 3 -- POST DECREE  
**Status:** ACTIVE

**Owners:** PERRY MCDOWELL  
7 WOODSIDE PL  
CARMEL VALLEY, CA 93924 9545

**Priority Date:** DECEMBER 31, 1912

**Type of Historical Right:** USE

**Purpose (use):** IRRIGATION

**Irrigation Type:** FLOOD

**Flow Rate:** 49.37 GPM

**Volume:** THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

**Climatic Area:** 3 - MODERATE

**Maximum Acres:** 4.56

**Source Name:** UNNAMED TRIBUTARY OF LAKE CREEK

**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSWNW	29	31N	33W	LINCOLN

**Period of Diversion:** MAY 1 TO SEPTEMBER 15

**Diversion Means:** HEADGATE

**Period of Use:** MAY 1 TO SEPTEMBER 15

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	4.56		NENENE	30	31N	33W	LINCOLN
<b>Total:</b>	4.56						